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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MARIANNA FISHER, Plaintiff and Appellant, v. ALLIS-CHALMERS CORPORATION PRODUCT LIABILITY TRUST et al., Defendants and Appellants.	F035149 (Super. Ct. No. 134759) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Merced County. Frank Dougherty, Judge.

Tony L. Cogliandro for Plaintiff and Appellant.

Haight, Brown & Bonesteel, Thomas N. Charchut, Lisa L. Oberg and Daniel J. Kelly for Defendants and Appellants.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of subparts I.B and I.C and parts II and III of Facts and Proceedings and parts I, II and sections 2 and 3 of subpart III.B of the Discussion.

In this case, the widow of a man burned to death by hot oil expelled by a voltage regulator brought a products liability claim against the manufacturer of the regulator and the purported successor in interest of the manufacturer. On a postjudgment motion, the trial court ruled that (1) plaintiff was entitled to relief from defendants' requests for admission that were deemed admitted, (2) without the deemed admissions, summary judgment for defendant Allis-Chalmers Corporation Product Liability Trust (Allis Trust) was no longer appropriate, and (3) defendant Siemens Energy & Automation, Inc. (Siemens) remained entitled to summary judgment because it was not a successor in interest of Allis-Chalmers Corporation (Allis-Chalmers). All parties appeal. We conclude plaintiff should be relieved of the admissions, Allis Trust is not entitled to summary judgment, and the summary judgment in favor of Siemens must be reversed.

FACTS AND PROCEEDINGS

I. The Accident and Claims Asserted

On March 27, 1996, Norval Fisher was working as a substation maintenance electrician for Pacific Gas and Electric Company (PG&E) and investigated a problem with a load tap changer on a type AFR 12,000-volt, 3-phase voltage regulator (AFR Regulator) manufactured in approximately 1966 by Allis-Chalmers. Norval Fisher was fatally injured when hot or burning oil was expelled through the tap load changer's pressure release valve and struck him while he was standing at the AFR Regulator's control panel.

Norval Fisher's widow, Marianna Fisher (Fisher), sued Allis Trust and Siemens (collectively, defendants) alleging a products liability claim on the grounds the AFR Regulator was defective because (1) the pressure release value was positioned in such a manner that oil expelled from the load tap changer compartment would hit individuals standing at the control panel; and (2) the internal components of the load tap changer became pitted, which resulted in the ignition of the oil expelled from the compartment.

A. Defendants' Defense on the Merits

Allis Trust and Siemens defend the action on the basis that the accident was not caused by either a design or manufacturing defect in the AFR Regulator and that the sole cause of the accident that resulted in Mr. Fisher's death was PG&E's negligent maintenance, repair and inspection of the AFR Regulator. Defendants contend (1) pitting, and the resulting electrical arcing, is a normal consequence of nearly 30 years of use; and (2) PG&E modified the load tap changer compartment by permanently sealing and capping its upper breather opening, thereby preventing the escape of air and gases from the compartment. Defendants contend the ignition of the oil expelled by the compartment was most likely caused by the buildup of combustible gases due to the plugging of the upper breather opening. In addition, Siemens contends it is not a successor in interest of Allis-Chalmers and, therefore, is not liable for claims related to the AFR Regulator.

B. Fisher's Factual Contentions*

As one of the grounds for opposing the merits of defendants' motions for summary judgment, Fisher asserts:

> "The defects identified by Plaintiff were caused by the poor design and substandard manufacture of the AFR Regulator. The load tap changer compartment was not negligently modified when the upper breather opening was plugged, as this was done by the factory. The pitting of the dial switch contacts was not caused by weak contact pressure due to wear and tear during the equipment's nearly 30 years of service, it was caused by an improper design and poor workmanship in its manufacture. Further, the defect was know by Defendants, who made modifications to the subsequent load tap changers, but failed to notify PG&E that the item was improperly manufactured, or that a sudden cascade failure could result, even if PG&E exceeded the maintenance schedule, which it did. The ignition of the oil expelled from the compartment was not caused by the build-up of

* See footnote on page 1, *ante*.

combustible gases due to the plugging of the upper breather opening, as the factory did this prior to shipment and provided an alternate breather system. [References to the Declarations of Gary Barton and Tony Nothelfer.]"

Gary Barton serves as a maintenance supervisor with PG&E, maintaining and testing all substation equipment. Barton's duties also include "tearing down regulator tap changers, including the one involved in this incident." Barton has been employed by PG&E since April 13, 1964. Tony Nothelfer is employed in PG&E's electrical transmission maintenance department as an electrical substation engineer. He has a 1978 master's degree in electrical power from the University of Southern California as well as a bachelor's degree in engineering. PG&E gave Nothelfer assignments relating to failure analysis of accidents. Nothelfer was the principal author of two reports on the incident involving Norval Fisher and is of the opinion that the manufacturer of the AFR Regulator is solely responsible for the explosion of March 27, 1996.

C. Defendants' Affirmative Defense*

Defendants also assert a primary assumption of the risk defense on the grounds that the "maintenance and repair of energized load tap changing equipment involves the inherent risk that improper maintenance of the equipment could cause arcing and explosions." Fisher denies "that improper maintenance occurred and that the explosion and [the] death of Norval Fisher was caused by improper maintenance by PG&E or Norval Fisher," based on the declarations of Barton and Nothelfer.

II. First Judgment*

In August 1998, defendants filed motions for summary judgment which attacked the elements of Fisher's product liability claim, presented an affirmative defense, and asserted Siemens was not a successor in interest of Allis-Chalmers. In September 1998,

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* See footnote on page 1, *ante*.

* See footnote on page 1, *ante*.

defendants filed a motion to deem admitted matters contained in requests for admission propounded to Fisher and to PG&E. All of the motions were set for hearing on October 19, 1998.

In October, prior to the hearing date, Fisher served an ex parte request for a continuance because she did not have an expert, filed a request for dismissal as to PG&E, and served responses to the requests for admission which were improperly verified by her attorney. Fisher did not file an opposition to the motions for summary judgment or the motion to deem matters admitted.

At the October 19, 1998, hearing the court granted the motion to deem matters admitted and granted the summary judgment motions. Counsel for Fisher did not attend the hearing. In November 1998, judgment in favor of the defendants was filed and recorded (the first judgment) and notice of entry of judgment was served.

In January 1999, Fisher filed a timely notice of appeal. (*Fisher v. Allis-Chalmers Corp.*, F032492.) While the appeal was pending, Fisher filed a motion for relief under Code of Civil Procedure section 473.[1] Defendants claimed the trial court did not have jurisdiction to decide the motion while the appeal was pending. Fisher requested dismissal of the appeal. The Court of Appeal ordered the appeal dismissed and subsequently issued a remittitur.[2]

After the remittitur was issued, the trial court heard argument on Fisher's motion for relief under section 473. In June 1999, the trial court found "there was excusable neglect by plaintiff's attorney" and set aside its October 19, 1998, order granting

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[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

[2] Defendants' request for judicial notice filed December 7, 2000, regarding certain documents concerning the dismissed appeal is granted.

summary judgment to defendants. The order deeming admitted the requests for admission propounded to Fisher was not set aside at that time.

III. Second Judgment*

In July 1999, defendants renewed their motions for summary judgment and added further facts as undisputed based on the deemed admissions. Fisher opposed the motions and moved to set aside the deemed admissions. In August, defendants filed their reply to Fisher's opposition to their motions for summary judgment and an opposition to Fisher's motion to set aside deemed admissions.

The trial court heard the motions on November 1, 1999, and granted the motions for summary judgment and denied the motion to set aside deemed admissions. An order granting defendants' summary judgment motions was filed on December 3, 1999, and a judgment in favor of defendants was filed and recorded on December 6, 1999 (the second judgment).

On December 15, 1999, Fisher filed a postjudgment motion based in part on the Supreme Court's November 22, 1999, decision in *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973 [section 2033 permits the withdrawal or amendment of admissions deemed admitted for failure to respond] (*Wilcox*), and requested a rehearing and reconsideration of the trial court's rulings on the deemed admissions and the summary judgment motions. Defendants opposed the motion. A hearing was held on February 1, 2000, and the trial court requested additional briefing before considering the matter submitted. After the parties filed additional papers, the trial court ruled that it would construe Fisher's motion as a motion to vacate, it would grant the motion to vacate as to the deemed admissions and the judgment entered in favor of Allis Trust, but the judgment in favor of Siemens

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* See footnote on page 1, *ante*.

would not be vacated because it was based on the finding that Siemens was not a successor in interest to Allis-Chalmers and did not rely on the deemed admissions.

Fisher appeals, primarily requesting reversal of the judgment entered in favor of Siemens; defendants appeal claiming (1) the second judgment was void and the first judgment was valid or (2) the trial court erred in setting aside the deemed admissions and the portion of the second judgment in favor of Allis Trust.

DISCUSSION

I. Timeliness of the Section 473 Motion to Set Aside First Judgment*

Defendants claim the trial court lacked jurisdiction to make its June 28, 1999, order setting aside the November 10, 1998, judgment in favor of defendants because Fisher's motion for relief under section 473 was filed (on April 2, 1999) during the pendency of an appeal. Furthermore, defendants assert the six-month period for making a section 473 application had expired before May 20, 1999, when the trial court regained jurisdiction upon the abandonment of appeal. As a result, defendants contend that even if Fisher's section 473 application for relief was deemed filed on the same day as jurisdiction returned to the trial court, the application was untimely and untimeliness is a jurisdictional defect rendering the trial court's order granting relief void.

Subdivision (b) of section 473 provides that the "[a]pplication for … relief … shall be made within a reasonable time, in no case exceeding six months, after the judgment … was taken." With respect to when a judgment "was taken," the court in *In re Marriage of Jacobs* (1982) 128 Cal.App.3d 273, 283, ruled the critical date for a stipulated interlocutory judgment of dissolution was the date of entry of judgment. As to an ordinary judgment, the court in *Brownell v. Superior Court* (1910) 157 Cal. 703, 707, stated the time runs from the "rendition" of the judgment. The court also stated "the

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* See footnote on page 1, *ante*.

signing and filing of the formal order would constitute a 'taking' thereof so far as an application for relief under section 473 is concerned." (*Id*. at p. 708.)

In this case, we hold the judgment "was taken" when it was signed and filed on November 10, 1998. Consequently, the question becomes whether Fisher's application for relief under section 473 was "made" within six months of November 10, 1998.

Some of the older cases cited by defendants in their appellate brief (e.g., *Thomas v. Superior Court, Etc.* (1907) 6 Cal.App. 629; *Swan v. Riverbank Canning Co.* (1947) 81 Cal.App.2d 555) arose under the strict rule "that relief could not be granted where the notice was served and filed before, but set the hearing after, the [six months] time had expired." (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 178(b), p. 685.) However, this rule has been abrogated and "service and filing within the period is enough." (*Ibid*.) In other words, an application is "made" for purposes of section 473 when it is served and filed. (See § 1005.5) Accordingly, Fisher's service and filing of the application for relief under section 473 on April 2, 1999, falls within the six-month time period, unless there is merit to defendants' position that the motion should not be deemed filed until the pending appeal was terminated.

Defendants' argument that Fisher's application should be regarded as a nullity because it was filed before the remittitur was issued overlooks the jurisdiction retained by trial courts while an appeal is pending. Section 916, subdivision (a), provides in pertinent part that "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

"'As a general rule, a duly perfected appeal divests the trial court of further jurisdiction in the cause except with respect to collateral matters [such as a motion for new trial].' (*Foggy v. Ralph F. Clark & Associates, Inc.* (1987) 192 Cal.App.3d 1204, 1211 …, citing *Neff v. Ernst* (1957) 48 Cal.2d 628, 633-634 …; see Code Civ. Proc., §

916.)[ ] After perfection of an appeal, the trial court 'may not vacate or amend a judgment or order valid on its face, or do any other act which would affect the rights of the parties or the condition of the subject matter.' (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 6, p. 36.)" (*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal.App.4th 630, 641, fn. omitted.)

"The purpose of the rule depriving the trial court of jurisdiction in a case during a pending appeal is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it. (*In re Marriage of Horowitz* (1984) 159 Cal.App.3d 377, 381 …..)" (*Betz v. Pankow* (1993) 16 Cal.App.4th 931, 938.)

In the present case, we conclude the jurisdiction retained by the trial court was sufficient to accept the filing of Fisher's application under section 473. The *filing* of the application and the trial court's order establishing a briefing schedule and setting the hearing on the application for a date after the remittitur was issued did not alter or affect the appealed judgment and was merely preparatory to the trial court's subsequent ruling on the application. The trial court did not set the judgment aside until after the remittitur was issued and the full range of jurisdiction had returned to the trial court. Consequently, the cases cited by defendants in which the trial court attempted to rule on an application under section 473 *before* the remittitur was issued are inapposite. In addition, in managing its caseload, a trial court can choose to wait until a pending appeal has been terminated before ruling on a section 473 application; we have found no case law, statute or rule of court requiring a trial court to (1) rule before a remittitur is issued and (2) in so ruling, declare the application a nullity.

Finally, defendants argue the language of subdivision (b) of section 473 stating the application for relief "shall be accompanied by a copy of the … pleading proposed to be filed therein" mandated the denial of Fisher's application. However, the section 473

application was "accompanied by" Fisher's pleadings opposing defendants' motions for summary judgment for nearly a month before the trial court's decision on June 28, 1999. Therefore, the trial court was not required by subdivision (b) of section 473 to deny the application on procedural grounds.

Based on the foregoing, we conclude the trial court had jurisdiction on June 28, 1999, to set aside the November 10, 1998, judgment as requested in Fisher's application for relief under section 473. As a result, we reject defendants' argument that "[a]ll subsequent proceedings, therefore, were a nullity and Fisher's present appeal must be dismissed because it is taken from a void judgment."

II. The Deemed Admissions and Summary Judgment As to Allis Trust*

We find it unnecessary to retrace the complex procedural path that lead to the postjudgment order by the trial court vacating the order deeming defendants' requests for admission admitted and vacating the grant of summary judgment for Allis Trust; we need not address the procedural issues raised by the postjudgment order. Instead, we proceed directly back to the orders denying Fisher's motion to set aside deemed admissions and the order granting summary judgment to Allis Trust. We are satisfied that even if there were procedural defects in the corrective orders that set aside these underlying orders, the underlying orders must be set aside; both appeals place the underlying orders in issue. Before reaching the merits of those orders, we consider the issues of whether Fisher's appeal was timely and whether Fisher waived her right to appeal the judgment and underlying orders as they relate to Allis Trust.

A. Timeliness of Fisher's Appeal

The 60-day period for Fisher to file her notice of appeal began to run on December 30, 1999, when the clerk mailed copies of the second judgment. Fisher filed

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* See footnote on page 1, *ante*.

her notice of appeal on February 29, 2000, one day after the 60-day period expired. Thus, defendants contend the appeal was untimely.

We hold Fisher was entitled to an extension under rule 3(b) of the California Rules of Court[3] because her December 15, 1999, motion, as construed by the trial court, was a valid motion to vacate. The record clearly indicates the trial court exercised its discretion under *Passavanti v. Williams* (1990) 225 Cal.App.3d 1602, 1608, and construed Fisher's motion filed on December 15, 1999, as "a motion to vacate judgment." The trial court's use of the phrase "motion to vacate" was taken from *Passavanti v. Williams*, *supra*, 225 Cal.App.3d 1602, and the court in that case took the phrase from rule 3. Rule 3 provides that the time for filing a notice of appeal may be extended if a valid notice of intention to move for a new trial or "a valid notice of intention to move to vacate a judgment or to vacate a judgment and enter another and different judgment is served and filed." The trial court's reference to excusable neglect indicates it was considering the motion under section 473. It is well established that one of the kinds of "motion to vacate" within the purview of rule 3(b) is a section 473 motion for relief from judgment. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 108; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 487-488, pp. 532-533.)

While our analysis does not reach the issue of whether the trial court's grant of the postjudgment motion was proper, we conclude the motion had sufficient merit to be considered a valid motion for purposes of rule 3(b). Consequently, the extension of time to file a notice of appeal applied and, as a result, Fisher's notice of appeal was timely.

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[3] Unless otherwise indicated, all further references to rules are to the California Rules of Court.

B. Right to Appeal Matters Concerning Allis Trust

On March 20, 2000, Fisher filed a "Partial Waiver of Issues on Appeal After Filing the Notice of Appeal" which stated that she appealed "from the Order granting [Siemens's] Motion for Summary Judgment, and the judgment entered thereon, and as to that Defendant only, and all other adverse orders and rulings of the Court."

Defendants argue Fisher's filing waived her right to appeal the deemed admission order and the summary judgment order as to Allis Trust. A party can expressly waive the right to appeal if (1) counsel was authorized by the client to waive the appeal rights, (2) the waiver was express, and (3) the waiver was voluntary, not improperly coerced by the trial judge or other party. (*McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1985) 176 Cal.App.3d 480, 488.)

In this case, there is nothing in the record showing Fisher authorized her counsel to waive her rights of appeal relating to Allis Trust. Furthermore, we will not imply such an authorization. (See *Linsk v. Linsk* (1969) 70 Cal.2d 272, 278; 1 Witkin, Cal. Procedure (4th ed. 1997) Attorneys, § 283, pp. 351-352.) In *Fowlkes v. Ingraham* (1947) 81 Cal.App.2d 745, 747, the court implied the authority to waive rights of appeal where the attorney signed a stipulation and the waiver was supported by consideration. Even assuming *Fowlkes* sets forth the correct rule of law, the present case is readily distinguishable because the document filed was not a stipulation or other type of bilateral agreement and Fisher received no consideration in exchange for the purported waiver.

Accordingly, we hold the record does not establish Fisher waived her right to appeal the judgment and orders relating to Allis Trust. Also, Fisher's broadly worded notice of appeal filed February 29, 2000, covers these issues.

C. The Deemed Admissions

In its order filed December 3, 1999, the trial court denied Fisher's motion to set aside deemed admissions on the grounds that Fisher "has not met her burden of establishing that the court has the authority to set aside the deemed admissions order

under … section 2033(k) or that it should do so under the circumstances here presented." As previously set forth, the trial court later set aside these admissions.

We are satisfied the trial court's postjudgment determination setting aside the deemed admissions embodies a correct ruling on the merits. The December 3, 1999, order did not consider the change in law resulting from *Wilcox* and, thus, did not apply the appropriate legal standard to the issue of whether or not the deemed admissions should be set aside.

The appropriate legal standard was set forth in *Wilcox*, when the Supreme Court ruled the provisions of section 2033, "subdivision (m), permit[] the withdrawal or amendment of admissions deemed admitted for failure to respond." (*Wilcox, supra,* 21 Cal.4th at p. 975.) Under section 2033, subdivision (m), a trial court has discretion to grant relief from the deemed admissions if (1) they resulted from excusable neglect and (2) the relief would not substantially prejudice the propounding defendant in maintaining its defense on the merits.

We need not remand this issue to the trial court for consideration of section 2033, subdivision (m), in light of *Wilcox* because the trial court already has found excusable neglect caused the requests for admission to become admitted, implicitly found no substantial prejudice to the defendants, and exercised its discretion to grant relief. The willingness of the trial court to exercise its discretion and grant relief from the deemed admissions furthers "the policy favoring the resolution of lawsuits on the merits. [Citation.]" (*Wilcox*, *supra*, 21 Cal.4th at p. 983.)

The finding of the two elements of subdivision (m) of section 2033 is strongly supported; we briefly summarize pertinent portions of the record. Fisher's response to the 73 requests for admission denied most of the requests based on lack of information sufficient to form a belief. The responses were mailed on October 15, 1998, slightly less than one month after the responses were due, and they were not properly verified. Instead of being verified by Fisher, the responses were verified by her attorney. Fisher's

verifications were mailed to defendants on April 14, 1999. The attorney's declaration stated he wrongly believed he could verify the responses because his client resided in a different county than where his office was located. The attorney also asserted that the delay in the response was caused by the technical nature of the requests for admission and problems he had with obtaining assistance from an expert he had retained. That expert withdrew from his relationship with Fisher because he believed his assistance in opposing a motion for summary judgment by Siemens would adversely effect his ability to consult with Siemens on behalf of another client.

The foregoing evidence supports the trial court's determination that the reasons given by Fisher's attorney explaining the delay of one month in mailing the responses and the inadequate verification attached to those responses constituted excusable neglect.

As to the second element of section 2033, subdivision (m), defendants' defense on the merits would not be prejudiced by setting aside the deemed admissions. Aside from defendants' assertion that the prejudice is "manifest," there is nothing in the record showing how they were misled or how their defense on the merits has been made more difficult by the relief granted. The fact that a defense on the merits is now necessary is not "prejudice" within the meaning of section 2033, subdivision (m).

Because the trial court has already rendered findings supported by substantial evidence, we will dispose of the issue rather than remand it to the trial court. Accordingly, we hold Fisher is relieved of the previously deemed admissions.

We need not address whether the deemed admissions of PG&E were or should be set aside. Section 2033, subdivision (n), provides that any admission made by a party is binding only on that party and only for the pending action. Consequently, the deemed admissions of PG&E cannot be used against Fisher in any manner in any subsequent proceedings in this case. This prohibition against use of the deemed admissions includes, but is not limited to, using them to impeach or rebut the witnesses of Fisher who are, or were, employees or agents of PG&E. Defendants have incorrectly asserted in their

appellate brief that "if PG&E itself could not dispute the admitted matters, neither can its employees and agents."

D. Summary Judgment as to Allis Trust

The standards applicable when an appellate court reviews a motion for summary judgment are well established. (See § 437c.) We review de novo a trial court's ruling on a motion for summary judgment. (*Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 802.)

When considering a motion for summary judgment, the evidence offered in opposition to the motion must be liberally construed, while the moving party's evidence must be construed strictly, in determining a "triable issue" of fact. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.) "Only when the inferences are indisputable may the court decide the issues as a matter of law. If the evidence is in conflict, the factual issues must be resolved by trial. 'Any doubts about the propriety of summary judgment ... are generally resolved *against* granting the motion, because that allows the future development of the case and avoids errors.' [Citation.]" (*Ibid.*; *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.)

In *Wilcox*, the trial court's grant of summary judgment was reversed after this court and the Supreme Court ruled the plaintiff was entitled to relief from the deemed admissions. (*Wilcox, supra,* 21 Cal.4th at p. 983.) Allis Trust contends reversal of the order granting its motion for summary judgment is not required because the order did not rely on the deemed admissions. To support this position, Allis Trust points to the summary judgments that resulted in the first judgment and the fact that the deemed admissions did not exist when those motions were filed. However, Allis Trust fails to consider that Fisher did not oppose the first summary judgment motions. Fisher did oppose the second summary judgment motions and once the deemed admissions were set aside, Fisher's opposition raised issues of material fact. Furthermore, at the November 1, 1999, hearing, the trial court relied entirely on the deemed admissions when stating its

reasons for granting Allis Trust's motion for summary judgment. Consistent with its November 1, 1999, ruling from the bench, when the trial court issued its postjudgment order, it concluded issues of material fact existed once the deemed admissions were vacated. We concur in this assessment and hold Fisher's "Opposition to Defendants' Separate Statement of Undisputed Material Facts" and the declarations of Barton and Nothelfer raise triable issues of fact.

Defendants assert the summary judgment should stand because Fisher's opposition papers are based on opinions of purported experts that lack foundation. However, given the liberal construction accorded the evidence offered by the party opposing a summary judgment, we conclude, as did the trial court, that defendants' rendition of the facts is disputed and triable issues of material fact exist.[4]

III. Siemens As Successor In Interest of Allis-Chalmers

Fisher appeals the December 6, 1999, judgment in favor of Siemens and the underlying order granting Siemens's motion for summary judgment. In ruling on Fisher's postjudgment motion, the trial court held the judgment in favor of Siemens would not be vacated because it was based on the finding that Siemens was not a successor in interest to Allis-Chalmers and did not rely on the deemed admissions that the trial court set aside. Fisher argues Siemens's motion for summary judgment was improperly granted because it did not contain a sufficient basis for eliminating any of the five theories of successor in interest liability recognized under California case law.

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[4] As stated above, defendants' attempt to rebut or negate the declarations of Barton and Nothelfer with the purported deemed admissions of PG&E is prohibited by section 2033, subdivision (n). Also, we need not address Fisher's hearsay objections to the Roland Ryan declaration.

A. Facts

Siemens's existence as a corporation began on July 14, 1972, when it was incorporated under the laws of the State of Delaware with the name "Allis-Chalmers Electric, Inc." This corporation was used by Allis-Chalmers and Siemens Aktiengesellschaft, a German corporation, as the business entity for their joint venture to manufacture and sell certain electrical products in the United States. The joint venture apparently took form in 1977 when the corporation's name was changed to "Siemens-Allis, Inc." and a "Shareholder Agreement between Allis-Chalmers Corporation and Siemens Aktiengesellschaft establishing Siemens-Allis, Inc." dated July 10, 1977 (Shareholder Agreement), was signed. The management and ownership of the joint venture was controlled in part by provisions of the Shareholder Agreement concerning corporate governance (article 9) and restrictions on transfers of the stock (article 10). Siemens Aktiengesellschaft and Allis-Chalmers became the only two holders of common stock of Siemen-Allis, Inc.

The joint venture acquired a business when assets of the Allis-Chalmers Electrical Products Group (EPG) were transferred[5] from Allis-Chalmers to Siemen-Allis, Inc. in accordance with a "Transfer Agreement" effective as of January 1, 1978, between Allis-Chalmers and Siemens (Transfer Agreement). As consideration, Allis-Chalmers received 80 shares of common stock of Siemens-Allis, Inc. Siemens Aktiengesellschaft received the right to acquire 20 shares of common stock of Siemens-Allis, Inc. in exchange for cash. Wendell F. Bueche, Executive Vice President of the Electrical Group of Allis-Chalmers, was asked to become president of the joint venture corporation.

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[5] To avoid wrongly implying Allis-Chalmers was paid cash for its assets, we refer to the transaction involving the exchange of assets for stock as a "transfer" and not a "sale."

The Transfer Agreement also addressed the extent to which Siemens assumed responsibility for product liability claims arising out of the conduct of the business of the EPG. Specifically, the provisions of subparagraph 2.01C of the Transfer Agreement stated that Siemens shall "assume … any and all claims … or liabilities of any kind or nature now in existence or hereafter arising from or relating to the conduct of the business of the Electrical Products Group by ALLIS-CHALMERS or its Subsidiaries including *but not limited to* (i) …; (ii) …; (iii) … and (iv) …." (Italics added.) Subparagraph 2.01C also contained a proviso stating Siemens "will not be responsible for" specific types of claims or circumstances described in clauses (a) through (d).

In January 1986, after the joint venture had operated approximately eight years, a Siemens Aktiengesellschaft entity purchased Allis-Chalmers's ownership interest in the joint venture corporation. (*Fireman's Fund Insurance Companies v. Siemens Energy & Automation, Inc.* (S.D.N.Y. 1996) 948 F.Supp. 1227, 1229, fn. 3 [relying on a deposition of Linda Feuss] (*FFIC and Allis v. Siemens*).) On January 31, 1986, the name of the joint venture corporation was changed from "Siemens-Allis, Inc." to "Siemens Energy & Automation, Inc." This purchase of the stock owned by Allis-Chalmers occurred about 17 months before Allis-Chalmers and 17 affiliated entities filed for chapter 11 bankruptcy on June 29, 1987. The record on appeal does not reflect the economic impact on Allis-Chalmers of the transfer of the assets of the EPG. Defendants have not shown what consideration Allis-Chalmers received for the stock or the amount of cash generated by the joint venture and paid to Allis-Chalmers from the date of transfer of the assets until the sale of its ownership interest in 1986.

After Allis-Chalmers's bankruptcy filing, the "First Amended and Restated Plan of Reorganization of Allis-Chalmers Corporation," was confirmed by the bankruptcy court on October 31, 1988, and created the Allis Trust. Although a copy of the confirmed plan is not contained in the record on appeal, the declaration of Margaret B. Bruemmer, trustee of the Allis Trust, stated that the Allis "Trust was created to provide for an orderly

disposition of existing and future product liability claims arising out of the operations of Allis-Chalmers." However, the orderliness of this disposition is subject to question. The court in *FFIC and Allis v. Siemens, supra,* 948 F.Supp. at page 1230 stated, "The Plan's treatment of present and future product liability claims left a number of potential issues unresolved." Whether Fisher's claim would be affected by any of those potential issues cannot be determined on the record before us. Also, the record does not contain any information regarding how many cents on the dollar, if any, are being paid under the confirmed plan on product liability claims.

In support of its motion for summary judgment, Siemens claims it "did not use or exploit the name 'Allis-Chalmers' in connection with its products." Fisher asserts the joint venture corporation exploited the name "Allis" at least until its name was changed from "Siemens-Allis, Inc." to "Siemens Energy & Automation, Inc."

Siemens also asserts it did not continue the Allis-Chalmers product line of type AFR voltage regulators and that Allis-Chalmers discontinued this specific product line six years prior to the transfer of the EPG assets to Siemens. In contrast, the declaration of Gary Barton, a maintenance supervisor with PG&E, states "[r]egulators of the same type as this regulator are currently being manufactured by Siemens and are virtually identical except for some minor items unrelated to [the] facts and circumstances surrounding this accident." The Barton declaration also asserts Siemens has continued to use the design of the regulator.

B. Potential Successor In Interest Liability

The general rule of successor nonliability provides that where a corporation purchases, or otherwise acquires by transfer, the assets of another corporation, the acquiring corporation does not assume the selling corporation's debts and liabilities. (*Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28 (*Ray v. Alad*).) This general rule does not apply if "(1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a

mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts." (*Ibid*.) A fifth exception to the general rule of successor nonliability was created by the Supreme Court in *Ray v. Alad, supra,* 19 Cal.3d 22, and has become known as the "product line successor" rule because, in certain limited situations, a person injured by the predecessor's product is given a remedy against the successor corporation. (See *Chaknova v. Wilbur-Ellis Co.* (1999) 69 Cal.App.4th 962, 969.)

To establish that it is entitled to summary judgment, Siemens must show the exceptions that create successor liability do not apply in this case. Those issues are "extremely fact sensitive." (William P. O'Neill, Advanced Issues In Strategic Alliances, 1193 PLI/Corp 351, 391 (July 2000) [discusses the joint venture's liability for Venturer A's obligations prior to the joint venture's acquisition of Venturer A's business].) Eliminating the exceptions requires disproving at least one element of each exception or showing that at least one such element cannot be established. (See *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 100.)

1. Siemens's agreement to assume Allis-Chalmers's tort liabilities

There is no legitimate dispute that Siemens agreed to assume some of the product liability claims against Allis-Chalmers arising from the business of the EPG. In this case, the issue is whether the contractual assumption includes Fisher's product liability claims. The extent of Siemens's contractual assumption raises questions involving the interpretation of the Transfer Agreement. These questions are not unique because the interpretation of the Transfer Agreement as it relates to product liability claims was addressed in a published decision of the United States District Court for the Southern

District of New York.[6] (*FFIC and Allis v. Siemens, supra,* 948 F.Supp. 1227.) Defendants and Fisher failed to cite this case.

In *FFIC and Allis v. Siemens,* the court held Siemens agreed to be responsible for the settlement, costs and expenses of the two product liability cases arising from the business of the EPG; Siemens's liability was $1,409,484.56. In *FFIC and Allis v. Siemens,* Allis-Chalmers and its insurance company sued Siemens to recover costs incurred by them in defending and settling two products liability cases brought against Allis-Chalmers. The claim of the insurance company and Allis-Chalmers was based upon indemnification language contained in both the Transfer Agreement and the Settlement Agreement. The same language in the Transfer Agreement is relevant in this case because Siemens agreed to "assume" the same liabilities that it agreed to indemnify Allis-Chalmers against. (See *FFIC and Allis v. Siemens, supra,* 948 F.Supp. at p. 1229 [quoting portions of subparagraph 2.01C].)

The provisions of subparagraph 2.01C of the Transfer Agreement at issue in this case, as well as in *FFIC and Allis v. Siemens*, provide that Siemens shall "assume … any and all claims … or liabilities of any kind or nature now in existence or hereafter arising from or relating to the conduct of the business of the Electrical Products Group by ALLIS-CHALMERS or its Subsidiaries including *but not limited to* (i) …; (ii) …; (iii) … and (iv) …." (Italics added.)

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6 Although not made part of the record in the present case, a settlement agreement between Allis-Chalmers and Siemens concluded in June 1989 and approved by the judge in the Allis-Chalmers's bankruptcy proceedings on August 15, 1989 (Settlement Agreement), also addressed Siemens's responsibility for product liability claims arising out of the conduct of the business of the EPG. (See *FFIC and Allis v. Siemens, supra*, 948 F.Supp. at pp. 1230-1231.)

The foregoing provisions of subparagraph 2.01C are not ambiguous on their face. The phrases "any and all" and "of any kind or nature" do not exclude Fisher's theory of product liability from Siemens's assumption. Fisher's lawsuit clearly presents a "claim." That claim arose after the January 1, 1978, effective date of the Transfer Agreement and it arose from or related to "the conduct of the [EPG] by ALLIS-CHALMERS." Furthermore, a literal interpretation of the phrase "including but not limited to" as it relates to clauses (i) through (iv) means those provisions do not limit the general language of assumption contained in subparagraph 2.01C. Consequently, under a literal reading of subparagraph 2.01C, Siemens agreed to assume the liability represented by the Fisher lawsuit.

Siemens's "Amended and Augmented Separate Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment" (1) did not address this literal reading of the assumption language in subparagraph 2.01C; (2) did not attempt to show the assumption language was actually ambiguous; and (3) did not address the next step of setting forth uncontradicted extrinsic evidence showing the "ambiguous" assumption language could only be construed to mean the parties did not intend for Siemens to assume the liability represented by the Fisher products liability claim. Therefore, Siemens was not entitled to summary judgment because it failed to establish its agreement to assume liabilities excluded the Fisher products liability claim.

Siemens did address Fisher's assertion that Siemens contractually assumed the liability represented by her product liability claim in its appellate brief, but gave it short shrift. Siemens's appellate brief stated, "in her effort to create a triable issue of material fact, Fisher attempts to pick and choose among certain so-called indemnity provisions of the transfer agreement relating to the joint venture." Siemens's only argument supporting this statement is that the creation of the Allis Trust "clearly establishes that, in fact, there was no intent by the parties to the joint venture transfer agreement that Siemens Energy would assume any liability for discontinued products, especially those it never

manufactured." Siemens infers this conclusion regarding mutual intent from the assertion that if such an intent existed, there would have been no need to create the Allis Trust. While the creation of the Allis Trust over 10 years after Allis-Chalmers and Siemens signed the Transfer Agreement may shed some light on the mutual intention expressed in the Transfer Agreement, Siemens's logic is fatally flawed because there is no evidence that the Allis Trust only handled product liability claims related to the business of the EPG. Reported cases show the breadth of claims handled by the Allis Trust goes beyond those claims arising from the conduct of the business of the EPG. (See e.g., *Moore v. Cardinal Packaging Inc.* (Ohio App. 2000) 735 N.E.2d 990, 992, fn. 2 [the Allis Trust is a defendant in litigation related to a forklift manufactured by Allis-Chalmers].) Accordingly, the creation of the Allis Trust had an obvious purpose even if all claims relating to the EPG were assumed by Siemens.

Defense counsel's cursory response to Fisher's argument that Siemens contractually assumed the liability represented by her claim and the weakness of their inference about the mutual intent of Siemens and Allis-Chalmers drawn from the existence of the Allis Trust only elevates the concern raised by defense counsel's failure to refer to published cases interpreting subparagraph 2.01C of the Transfer Agreement. Specifically, Siemens did not mention either *FFIC and Allis v. Siemens, supra,* or *Strausberg v. Siemens Energy & Automation, Inc.*, No. 93 Civ. 5734 (S.D.N.Y Oct. 20, 1994) (1994 WL 577008), *affirmed without opinion* (2d Cir. 1995) 54 F.3d 765, *cert. denied* 561 U.S. 964 (*Strausberg*), to the trial court or in its appellate brief, much less distinguish Fisher's product liability claim from the three product liability claims those cases held were Siemens's responsibility. Whether these omissions were an attempt to mislead the trial judge and this court about the meaning of the Transfer Agreement and whether Fisher's claim is legitimately distinguished from the other three claims are matters we leave to the trial court. (See Bus. & Prof. Code, § 6068, subd. (d); Cal. Rules Prof. Conduct, rule 5-200(B); *Ainsworth v. State Bar* (1988) 46 Cal.3d 1218, 1234

[attorney's wrongful acts included intentionally misleading a judicial officer].) We do note that Linda U. Feuss, inside counsel and the secretary of Siemens whose declaration authenticated the Transfer Agreement, knew of the prior litigation because she was involved in it. That she chose not to inform Haight, Brown & Bonesteel, LLP, about the published cases and that defense counsel's own research failed to uncover the cases, under the current state of the record, strains credulity.

On remand, the literal reading of the assumption language might prevail. Nevertheless, the possibility remains that Siemens may attack the broad assumption language contained in subparagraph 2.01C by proving one of the exceptions contained in clauses (a) through (d) of subparagraph 2.01C applies to the facts of this case. Also, Siemens might argue that the language of subparagraph 2.01C is ambiguous and clauses (i) through (iv) were in fact intended to limit the scope of the broad assumption language in a manner relevant to this case. If extrinsic evidence is offered to support this view, its *admissibility* is an issue to be determined on remand.

Clauses (a) through (d) of subparagraph 2.01C set forth the specific type of claims or circumstances that Siemens "will not be responsible for." These clauses, unlike clauses (i) through (iv), expressly restrict the extent to which, under subparagraph 2.01C, Siemens assumed "any and all claims … or liabilities of any kind or nature now in existence or hereafter arising from or relating to the conduct of the business of the Electrical Products Group by ALLIS-CHALMERS or its Subsidiaries …." None of these clauses appear to apply based on the record on appeal. Clause (a) excludes certain claims relating to transformers. Because the item of equipment involved in the accident in this case was a regulator, it appears clause (a) does not apply. Clause (b) excludes accidents arising before January 1, 1978, that are covered by insurance. Clause (c) excludes claims arising out of the collections of receivables. Clause (d) excludes amounts exceeding a formula, one element of which is certain of Siemens's expenditures within five years of the closing date. The existence of these exceptions show the drafters knew how to

exclude matters from the assumption and indemnification language, which strengthens the view that the drafters intended the phrase “including but not limited to” to mean what it says.

On remand, to show the assumption language is ambiguous, Siemens must present parol evidence regarding the meaning of the provisions of subparagraph 2.01C. (See *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166 [setting forth the two-step process used to decide whether to *admit* parol evidence].) Credible parol evidence of the intent of the parties to the Transfer Agreement concerning the scope of Siemens's assumption of liability may exist within the pleadings filed and the transcripts of depositions taken in *FFIC and Allis v. Siemens*, *supra*, 948 F.Supp. 1227, and *Strausberg*, *supra*, 1994 WL 577008, because in those cases Allis Trust and Siemens were in conflict over the meaning of their agreements defining Siemens's responsibilities.

We observe that extrinsic evidence exists that conflicts with the interpretation of the Transfer Agreement Siemens has advocated in this case. For example, in *FFIC and Allis v. Siemens*, *supra*, 948 F.Supp. at pages 1230 and 1234, Siemens took the position that it agreed to responsibility for Class 8 claims, *i.e.*, claims that included "product liability claims arising from events or occurrences on or after January 1, 1986." In its statement of undisputed facts filed in this case, Siemens states claims such as Fisher's "are treated as Class 8 general unsecured creditors in the Allis-Chalmers Bankruptcy." Accordingly, Siemens's 1996 statement that it agreed to responsibility for Class 8 claims supports the interpretation it assumed the liability represented by Fisher's claim.

Parol evidence of "subsequent acts and conduct of the parties" may be relevant to contract interpretation because it manifests the mutual intention of the parties about how their contract should be applied. (See *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473-474.) Consequently, evidence of other product liability cases in which Siemens did, or did not, assume or indemnify Allis-Chalmers or Allis Trust would be relevant, as well as any oral or written agreement or

understanding in the present case regarding defendants' respective responsibilities for liability to the plaintiff and the costs, expenses and attorney fees related to defense. Some such cases may be included in the list of pending cases Linda Feuss provided to Allis-Chalmers on August 22, 1989. (See *FFIC and Allis v. Siemens*, *supra*, 948 F.Supp. at p. 1231.)

In summary, the record currently shows that Siemens agreed to assume the liabilities arising from or relating to the conduct of the business of the EPG and does not show that the claim of Fisher is excluded from the assumption.[7]

2. Siemens's failure to establish it was not a "mere continuation" of Allis-Chalmers*[*]

In discussing the mere continuation exception to the general rule of successor non-liability, the Supreme Court in *Ray v. Alad Corp., supra,* 19 Cal.3d at page 29 stated, "California decisions holding that a corporation acquiring the assets of another corporation is the latter's mere continuation and therefore liable for its debts have imposed such liability only upon a showing of one or both of the following factual elements: (1) no adequate consideration was given for the predecessor corporation's assets and made available for meeting the claims of its unsecured creditors; (2) one or more persons were officers, directors, or stockholders of both corporations. [Citations.]"

"The crucial factor in determining whether a corporate acquisition constitutes either a de facto merger or a mere continuation is the same: whether adequate cash consideration was paid for the predecessor corporation's assets." (*Franklin v. USX Corp.* (2001) 87 Cal.App.4th 615, 625.) In this case, Allis-Chalmers did not receive cash

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[7] Whether Siemens could avoid liability by transferring some of the responsibilities it assumed to the Allis Trust is a question we need not address.

[*] See footnote on page 1, *ante*.

consideration under the Transfer Agreement. Instead, as described in the declaration of the trustee of the Allis Trust, Allis Chalmers received a percentage ownership interest in the joint venture corporation in the form of 80 shares of common stock of Siemens. Accordingly, Siemens has not established the consideration was adequate as a matter of law. Indeed, the record does not show what cash, if any, "was made available for meeting the claims of Allis-Chalmers unsecured creditors" as a result of the transfer of the assets of the EPG to Siemens.

With respect to the second factual element, Fisher argues that there is a sufficient overlap between directors and officers of Siemens and Allis-Chalmers because article 9 of the Shareholder Agreement gave Allis-Chalmers many rights in the corporate governance of the joint venture corporation including, among other things, the right to nominate five of the ten members of the board of directors of Siemens. Siemens's "Amended and Augmented Separate Statement of Undisputed Material Facts in Support of Defendants' Motion for Summary Judgment" does not provide any factual detail about who were the officers, directors or stockholders of both corporations since the incorporation of the joint venture corporation or the extent to which its directors and officers were formerly employed by Allis-Chalmers. However, exhibit L to the Shareholder Agreement shows an executive vice president of Allis-Chalmers was asked to be president of the joint venture corporation. Therefore, the record on appeal, insofar as it goes, shows Allis-Chalmers did exercise significant managerial control over the joint venture corporation, was one of two shareholders in the joint venture corporation, and may have had officers who were officers or directors of the joint venture corporation. Accordingly, Siemens failed to establish the second factual element of the "mere continuation" exception does not exist.

Therefore, we conclude issues of material fact exist about whether or not Siemens was a "mere continuation" of Allis-Chalmers.

3. Siemens's failure to establish the "product line successor" rule does not apply[*]

In *Ray v. Alad*, the Supreme Court set forth three criteria for imposing strict liability on the successor corporation: "(1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business." (*Ray v. Alad*, *supra*, 19 Cal.3d at p. 31.)

Siemens contends that Fisher must show all three criteria exist before Siemens can be held subject to the "product line successor" rule. Siemens asserts (1) Fisher cannot show her remedies have been destroyed because the Allis Trust exists and handles product liability claims relating to equipment manufactured by Allis-Chalmers, (2) the transfer of the EPG assets to Siemens did not cause Allis-Chalmers's bankruptcy, and (3) Siemens did not exploit the "Allis-Chalmers" name or trademark and, thus, did not enjoy the good will in the continued operation of the EPG business.

Siemens asserts that Fisher's claim against the Allis Trust will be treated as a Class 8 general unsecured creditor in the Allis-Chalmers bankruptcy and, thus, she has a remedy. However, Siemens's statement of undisputed facts provides no facts, either historical or projections by competent witnesses, about how many cents on the dollar, if any, are being paid to unsecured creditors in the Allis-Chalmers bankruptcy. In addition, unresolved issues concerning the confirmed plan's treatment of product liability claims may affect Fisher's claim. Consequently, the facts before us do not resolve the issue of

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[*] See footnote on page 1, *ante*.

whether Fisher's remedy has been destroyed for all practical purposes[8] or, alternatively, whether a class 8 claim is an effective remedy for Fisher.

Fisher argues, in effect, that the inadequate consideration received by Allis-Chalmers in exchange for the EPG assets weakened Allis-Chalmers and was one of the causes of its bankruptcy. As factual support for this theory, Fisher points to (1) financial records relating to the transfer that show Allis-Chalmers contributed over $61 million in actual value to the joint venture corporation and Siemens Aktiengesellschaft contributed only $15.3 million in actual value and (2) the fact Allis-Chalmers received 80 shares of common stock of Siemens-Allis, Inc. instead of cash. As observed *supra*, questions of fact exist regarding the adequacy of the consideration because the record does not show the economic effect on Allis-Chalmers of (1) the transfer of the EPG assets or (2) Allis-Chalmers's ownership interest in the joint venture.

The causation standard applicable to "product line successor" cases is not strictly interpreted. Instead, "[t]he successor need only have 'played some role in curtailing or destroying the [plaintiff's] remedies.' [Citations.]" (*Kaminski v. Western MacArthur Co.* (1985) 175 Cal.App.3d 445, 458.)

Siemens relies on the conclusory statement in Bruemmer's declaration that the "filing of Allis-Chalmers Bankruptcy petition in 1987 was for reasons totally independent of any action or contributing cause of Siemens-Allis, Inc. or the 1978 [transfer] of the EPG Assets. The [transfer] of the EPG assets did not cause or substantially contribute to the bankruptcy filing." However, neither Bruemmer's declaration nor any other source identify what the "totally independent" cause or causes of the bankruptcy were.

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8 One ordinary meaning of "virtually" is "for all practical purposes." (Webster's Third New International Dictionary (unabridged ed. 1986) p. 2556.)

Fisher has presented evidence supporting an inference as to causation that contradicts the conclusory statement regarding causation by Bruemmer, particularly in light of Siemens's failure to present evidence of the economic effect of the transaction on Allis-Chalmers. Accordingly, the trier of fact should decide whether the transfer of the EPG assets "played some role" in causing Allis-Chalmers to file for bankruptcy.

Ray v. Alad held it was fair and equitable to impose liability on the acquiror for the defective products of the predecessor because the acquiror obtained the predecessor's "trade name, good will, and customer lists, its continuing to produce the same [products], and its holding itself out to potential customers as the same enterprise." (*Ray v. Alad*, *supra*, 19 Cal.3d at p. 34.)

In this case, Siemens contends the third criteria cannot be shown because the Transfer Agreement required Siemens to discontinue the use of the trademark "Allis-Chalmers" and its logo within six months after the transfer. Fisher argues that it was fair to impose liability on the joint venture corporation because its name contained the word "Allis" for nearly nine years after the transfer of the EPG assets and it acquired the good will, customer lists, buildings, employees and other assets of Allis-Chalmers. (See *Kaminski v. Western MacArthur Co.*, *supra*, 175 Cal.App.3d at p. 455 [sets forth a number of factors relevant to this issue, including assurances to customers regarding the same experienced personnel and quality of good and services as the predecessor, use of customer list, retention of employees, and similarity of name of the successor].) Fisher also relies on paragraphs 23 and 24 of the declaration of Barton for the factual assertion that Siemens continued to manufacture regulators of the type as the AFR Regulator with some minor changes and that Siemens has continued to use the regulator design.

The evidence in the record clearly shows Siemens intended to, and did, enjoy the good will of Allis-Chalmers in Siemens's continued operation of the EPG business. In addition to the evidence referred to by Fisher, Siemens used part of Allis-Chalmers's name to promote its own marketing efforts. Subparagraph 1.05 of the Transfer

Agreement provides "ALLIS-CHALMERS shall not object at any time to the use by SIEMENS-ALLIS in each jurisdiction in which SIEMENS-ALLIS may market its products or services of the word 'Allis' in combination with 'Siemens.'" Also, the Transfer Agreement provided for the transfer from Allis-Chalmers to Siemens of 24 trademarks listed in Schedule 4 to the Transfer Agreement.

In light of the record, the limitation on the use of the trademark "Allis-Chalmers" is insufficient to show the joint venture corporation did not intend to benefit from the good name and good will associated with the business of the EPG and does not establish it is unfair or inequitable to impose liability on Siemens. In *Kaminski v. Western MacArthur Co., supra*, 175 Cal.App.3d at page 455, Western MacArthur Company was the corporate successor to Western Asbestos Company and the court upheld the trial court's finding of fact that the successor company's intent to benefit from the good name and good will of Western Asbestos Company was evident by the use of "Western" in the name of both businesses. Likewise, the joint venture corporation's use of the word "Allis" in its name for nearly nine years shows a similar intent.

Accordingly, we conclude Siemens has not eliminated as a matter of law the third criteria of the product line successor rule.

In summary, Siemens has not established as a matter of law that it is protected from liability by the general rule of successor nonliability because it has not eliminated the application of the exceptions to that rule including, but not limited to, (1) the exception concerning the assumption of liability by agreement, (2) the "mere continuation" exception, and (3) the exception for "product line successors." Furthermore, Siemens is not entitled to summary judgment on the merits of the product liability theory for the same reasons applicable to Allis Trust. (See Part II.D., *supra*.)

DISPOSITION

The December 6, 1999, judgment in favor of Siemens is reversed; the trial court is directed to vacate the December 3, 1999, order granting the motions for summary

judgment of the defendants and enter a new order denying the motions. We reinstate the trial court's orders vacating the finding that the requests for admission be deemed admitted and vacating the December 6, 1999, judgment in favor of Allis. The matter is remanded to the trial court for further proceedings consistent with this opinion. Fisher is awarded costs on appeal.

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VARTABEDIAN, J.

WE CONCUR:

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DIBIASO, Acting P. J.

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CORNELL, J.